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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAIME GALDAMEZ GUEVARA, Defendant and Appellant.	H039877 (Santa Cruz County Super. Ct. No. F18813)

I. INTRODUCTION

Defendant Jaime Galdamez Guevara was convicted of two counts of first degree murder (Pen. Code, § 187, subd. (a))[1], one count of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a)), and one count of active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found true a multiple murder special circumstance (§ 190.2, subd. (a)(3)) and a criminal street gang special circumstance (§ 190.2, subd. (a)(22)), as well as allegations that the murders and attempted murders were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)) and allegations that a principal used and personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b), (c), (e)(1)).

[1] All further statutory references are to the Penal Code unless otherwise noted.

The trial court imposed two consecutive terms of life without the possibility of parole (LWOP) for the murders, a consecutive term of seven years to life for the attempted murder, and consecutive terms of 25 years to life for the firearm discharge allegations associated with the murders and attempted murder. The trial court imposed the upper term of three years for the criminal street gang offense but stayed the punishment for that count pursuant to section 654. The trial court struck or stayed the punishment for the remaining enhancements.

On appeal, defendant contends: (1) the trial court erred by permitting a witness to testify because the trial court knew that the witness would invoke his Fifth Amendment privilege against self-incrimination; (2) the trial court erred by admitting expert opinion testimony about defendant's teardrop tattoos; (3) the trial court's two errors had a cumulative prejudicial effect that violated his right to due process; (4) there was insufficient evidence to support defendant's conviction of active participation in a criminal street gang; and (5) the imposition of LWOP sentences constituted cruel and unusual punishment.

For reasons that we will explain, we find no merit to defendant's contentions regarding the trial court's evidentiary rulings or his claim of cruel and unusual punishment, but we will modify the judgment by striking defendant's conviction for active participation in a criminal street gang.

II. BACKGROUND

A. Shooting Investigation

On January 23, 2010 at about 5:00 a.m., Santa Cruz police officers responded to a report of a possible gunshot wound at an apartment complex on Canfield Avenue. They found three people on a couch in the living room of Apartment No. 6: Alejandro Nava Gonzalez, Oscar Ventura, and Miguel Melchor. Both Nava Gonzalez and Ventura had

been shot in the head and were dead. Melchor, who was seated between Nava Gonzalez and Ventura, had not been shot.

An officer interviewed Kelsey Calabrez, the live-in girlfriend of Nava Gonzalez. Calabrez described two people she had seen in the apartment just before the shooting. When shown photographic lineups, Calabrez selected photographs of defendant, who was also known as "Begata," and Juvenal Lainez, who was also known as "Pochota."

B. Testimony of Building Residents

Calabrez testified that people often came to Apartment No. 6 on weekends to hang out, watch television, and drink beer. Defendant had come over the night before the shooting, along with two companions. At some point during the night, Calabrez went upstairs. She and Nava Gonzalez later went back downstairs to get some blankets. Calabrez saw Melchor and Ventura in the living room. Calabrez proceeded into the kitchen, passing by defendant and one of his companions in the hallway. Calabrez heard gunshots while she was in the kitchen. She saw defendant and his companion running from the living room out the back door of the apartment afterwards.

Hugo Rodriguez Guerrero (Rodriguez) also lived in Apartment No. 6. On the night of the shooting, defendant and Lainez were present at the apartment. Rodriguez was in bed upstairs when he heard an argument among Melchor, Ventura, defendant, and Lainez. Rodriguez got up and went to the bathroom. After the argument stopped, Rodriguez looked through the bathroom door, which was ajar. He saw defendant in the upstairs hallway, looking into a bedroom. He saw defendant go back downstairs. About three minutes later, Rodriguez heard gunshots. Rodriguez went downstairs and saw defendant and Lainez running out the back door.

Hugo Martinez Castillo (Martinez) was asleep in Apartment No. 6 at the time of the shooting. He had seen defendant at the apartment on prior occasions. Defendant was sometimes with Lainez.

Fidel Vargas Mondragon (Mondragon), who also lived in Apartment No. 6, also identified defendant and Lainez as having been at the apartment on prior occasions. Mondragon had been upstairs, sleeping, when he heard an argument, "as if somebody wanted to fight." He heard Melchor tell someone, "Leave me alone." After the argument, there was silence, then gunshots.

Martin Pardo lived in Apartment No. 8. He visited friends in Apartment No. 6 on the night of the shooting. Two Salvadorian men arrived at some point during the night, including one who was referred to as "Begata." When Pardo left, the two Salvadorian men were still in the apartment.

C. Melchor's Testimony and Statements

On the day of the shooting, Melchor (the surviving victim) was placed in a holding cell with Mondragon. Melchor told Mondragon that the shooters had been defendant and Lainez.

When he was interviewed by the police later that afternoon,[2] Melchor stated that "the Salvadorans" had "showed up . . . and started shooting." He did not see who fired the gun "because they had their faces covered." Melchor indicated he believed that the gunshot was meant for him. Melchor told the police that about five minutes before the shooting, he had called someone a "[f]ucking idiot."

About two years after the shootings, Melchor told Ventura's brother that defendant had been the shooter.

At trial, Melchor testified that he was "very drunk" on the night of the shooting Defendant and his Salvadorian companion were at the apartment at that time. Melchor recalled two men coming into the apartment with guns. He saw one of the men fire a gun. He fell onto a table and sustained an injury to his nose.

[2] Transcripts and recordings of Melchor's police interviews were played at trial.

D. Defendant's Arrest

On February 4, 2010, police located and arrested defendant outside of a residence in Mendota, a small town near Fresno. Defendant was interviewed that night.[3] Defendant repeatedly denied having been in Santa Cruz at any time during the prior four months.

Maria Matilde de Rivas Alfaro (de Rivas) lived at the Mendota residence where defendant was arrested. According to de Rivas, defendant had arrived about five days before his arrest, on January 28, 2010. Defendant stayed with Oscar Ruiz, who had been renting a room at the residence since early January. When Ruiz was interviewed on February 4, 2010, he admitted having been a member of the Mara Salvatrucha gang when he lived in El Salvador, and he had various tattoos indicating his gang affiliation: "sur" on the back of his neck, a devil's horn on his back, a Salvadorian flag on his stomach, "Mara Salvatrucha" on his chest, and three dots under his eye.

In a dresser located in the bedroom where defendant had been staying, police found a sock containing a .357 revolver and three bullets, plus a box of shotgun shells. Ballistics analysis showed that the bullets recovered from the murder victims had been fired from that revolver. No fingerprints were recovered from the revolver, and the DNA collected from the revolver could not include or exclude any individual.

E. Defendant's Jailhouse Admissions to Fausto Antonio Rodas

On October 19, 2010, Fausto Antonio Rodas was arrested for providing a false name to a police officer. Rodas was interviewed by Detective Jose Garcia, a federal agent, and another officer. Rodas was not questioned about the Canfield Avenue shootings that day. However, he provided information about other crimes, and the officers informed him that if he cooperated, they would "speak to those in a position above" about having him be "accepted to work."

[3] A video of the interview was played at trial.

After the interview, Rodas was taken to the Santa Cruz County jail and placed in a cell with defendant and Emanuel Antonio Ayala, known as "Tierra." Ayala had tattoos indicating his affiliation with the Mara Salvatrucha gang and was "at one point, third in charge" of the gang.

Rodas and defendant had met once before, about a year earlier. Rodas asked why defendant was "accepting responsibility for something he hadn't done," and defendant replied, "I did do it." Rodas had previously "heard out on the street" that Lainez had committed the murders and then gone to El Salvador.

Rodas met with Detective Garcia again the following day, October 20, 2010. Rodas reported on his conversation with defendant. Rodas told Detective Garcia that defendant said he and Lainez had both taken out guns, but that Lainez had "lost his nerve," so defendant "killed them both." At the time, Rodas believed he was going to get "[l]ess time" for providing information.

Detective Garcia believed Rodas was a member of the Mara Salvatrucha gang. Rodas had demonstrated his knowledge of the gang during the interviews, providing information about the gang's hierarchy, the gang's members, and local crimes committed by the gang's members. Rodas also had tattoos indicating he was a Mara Salvatrucha member: "MS" on his chest, the number 13, the Salvadorian flag, devil's horns, and "Mara Salvatrucha."

Rodas testified at trial pursuant to an immunity agreement. Rodas acknowledged that he was in federal custody for "being here illegally." On cross-examination, when asked if he was a member of the Mara Salvatrucha gang, Rodas invoked the Fifth Amendment and refused to answer.[4]

[4] The Fifth Amendment provides, in part, that no person shall be compelled in any criminal case to be a witness against himself or herself. (U.S. Const., 5th Amend.) The privilege extends not just to a defendant, but also to witnesses. (See *People v. Williams* (2008) 43 Cal.4th 584, 613.)

F. Gang Evidence

When defendant was arrested and booked into Fresno County jail on February 4, 2010, photographs were taken of his tattoos. On January 10, 2011, defendant was photographed again. At that time, defendant had additional tattoos, including two filled-in teardrop tattoos near his right eye.

When defendant was booked into the Santa Cruz County jail on February 9, 2010, he "self admitted" to being in the Mara Salvatrucha gang. Defendant indicated he was in good standing with the gang. Because of his claimed affiliation with the Mara Salvatrucha gang, defendant was put into "lockdown"—he was segregated from all other inmates. A month later, on March 9, 2010, defendant requested to be housed with "Southerners." After his reclassification, defendant was assaulted.

During defendant's trial, on May 9, 2013, a "kite" was found in a holding room where defendant had been transported prior to court. "Kites" are a form of communication: small pieces of paper folded so that they can be concealed on a person's body. Gang members use kites to write down violations of the gang's code of conduct so that the information can be acted upon. The kite found in defendant's holding room reported on Rodriguez's testimony. The kite also included the following line: "They call me Mara because I am from Mara Salvatrucha."

Watsonville Police Sergeant Morgan Chappell testified as a gang expert. Sergeant Chappell had been a gang detective for over three years and had investigated several hundred crimes during that time period. Previously, he had worked for the California Department of Corrections, and he had contact with gang members in that capacity as well. He had spoken to several hundred gang members as well as other gang experts about subjects such as gang culture, gang symbols, and gang tattoos.

In gang culture, a person must become a gang member in order to get "tattoos that are specific to the gang," and "tattoos that would lead somebody to believe that you had put in work for the gang." There is also a specific type of gang work that needs to be put

in for certain tattoos, including teardrop tattoos. A filled-in teardrop tattoo "traditionally means that you killed somebody." There would be "severe discipline" (i.e., an assault) from the gang if a gang member obtained a tattoo that indicated he was "bragging" about having committed a murder. A teardrop tattoo is "a big fat brag that you killed somebody."

Sergeant Chappell acknowledged that most gang members put gang tattoos, including teardrop tattoos, on the left side of the face. One gang member had explained that the left side was closer to the heart.

Officer Joe Hernandez testified as an expert on the Mara Salvatrucha gang. He described how the Mara Salvatrucha gang formed to protect Salvadorian immigrants in the Los Angeles area who were being targeted by the Mexican Mafia. The Mara Salvatrucha gang and the Mexican Mafia eventually reached an agreement, and the Mara Salvatrucha gang is now a Sureño gang that follows the rules of the Mexican Mafia. Unlike other gangs, the Mara Salvatrucha gang does not provide for a way for its members to drop out.

A person can become a gang member by being "jumped in" (being assaulted by members of the gang), by putting in "work" for the gang (committing crimes such as robberies, burglaries, and assaults), or by being "grandfathered in" (having a family member who is already in the gang). Officer Hernandez typically was not aware of whether someone had been "made a member" of a gang, so in determining a person's gang membership, he looked at whether the person was "an active participant," whether the person was engaging in criminal activity, whether the person had prior gang contacts, and whether the person had gang tattoos. The absence of gang tattoos was not necessarily determinative, because it might mean that the person had not "been given permission to obtain those yet."

Respect is very important in gang culture. A gang member who has the respect of fellow gang members will be "tapped" to go commit crimes for the gang, which will give

the person status. Showing a gang member a lack of respect will often result in the gang member becoming aggressive. A gang member can lose respect "right away" for being "someone who snitches." The repercussions for snitching is typically "a violent attack" or death.

Officer Hernandez believed that defendant was a member of the Mara Salvatrucha gang at the time of the Canfield Avenue shootings. Defendant's prior gang contacts included a May 30, 2008 incident. At the time, defendant was wearing a belt buckle with an "M" on it and a cap with a dollar sign on it—i.e., an "S" with a line on it, which was a sign of disrespect to Sureños. Defendant's two companions both had "MS" tattoos. Officer Hernandez believed that both of defendant's companions were members of the Mara Salvatrucha gang based on their prior contacts, their prior admissions to being Mara Salvatrucha members, and their tattoos, because "you have to be a gang member to have the [gang] tattoos." Defendant was also in the company of an admitted Mara Salvatrucha member on June 20, 2008.

Officer Hernandez testified that, in his opinion, Lainez was an "active participant" in the Mara Salvatrucha gang, but not a member of that gang. He explained: "Mr. Lainez is more on the side of just conducting the narcotic distribution and narcotic trafficking." Lainez "pays his rent for protection [by the gang] and the ability to sell narcotics in their territory." Lainez had "taken on [a] participation role" in the Canfield Avenue shootings in order to maintain his protection from the gang. Lainez had been in the company of Mara Salvatrucha gang members on prior occasions, including May 1, 2009, April 13, 2009, and May 22, 2009. On two of those occasions, Lainez was at an apartment frequented by many Mara Salvatrucha gang members.

Officer Hernandez did not believe that any of the victims of the Canfield Avenue shooting, nor any of the residents of Apartment No. 6, were gang members. However, he believed that the murders and attempted murder were committed at the direction of, for the benefit of, and in association with the Mara Salvatrucha gang because the shootings

occurred in Mara Salvatrucha territory and because the gang would have been perceived as not "tough" if defendant had allowed himself to be disrespected by Melchor.

G. Defense Testimony

Defense investigator Jack Alcantara interviewed Melchor at the Santa Clara County jail on May 31, 2012. Melchor identified defendant and Lainez as having been at his apartment on the night of the shooting, along with a number of other people. Melchor stated that when the shooters came in, defendant was seated on a couch in the living room.

Alcantara interviewed Rodas by telephone on March 1, 2013. Rodas was in federal prison in West Virginia at the time. Rodas acknowledged that he was a member of the Mara Salvatrucha gang and that Lainez was one of his "old time friends" from El Salvador. Rodas stated that he had lied to the police about defendant's confession to the shooting, in hopes of receiving a lighter sentence.

Defendant did not testify.

H. Charges, Verdicts, and Sentencing

Defendant was charged with two counts of murder (§ 187, subd. (a)), one count of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a)), and one count of active participation in a criminal street gang (§ 186.22, subd. (a)). The information alleged a multiple murder special circumstance (§ 190.2, subd. (a)(3)) and a criminal street gang special circumstance (§ 190.2, subd. (a)(22)), as well as allegations that the murders and attempted murders were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)) and allegations that a principal personally used and personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b), (c), (d), (e)(1)).

The prosecution's theory was that defendant attempted to shoot Melchor because Melchor was being "obnoxious," and defendant, as a gang member, wanted respect. The

prosecution argued that defendant shot Nava Gonzalez and Ventura to prevent them from identifying him.

The defense theory was that Lainez, not defendant, was the shooter, and that the Mara Salvatrucha gang was protecting Lainez by "sacrific[ing] one of their own"—i.e., Rodas. The defense argued that defendant took the gun to Mendota in order to "demonstrate his loyalty to the gang" and that he was assaulted in jail as "a warning" that he should continue to demonstrate his loyalty to the gang. The defense argued that defendant got the teardrop tattoos at the behest of the gang, to help him "take the fall" for the shootings. The defense also argued that Rodas was not credible, referring to him as a "[t]wo time felon" and "self admitted liar" who was "snitching for benefits" and hoping not to be deported. The defense argued that if Rodas was really snitching, he would have faced serious consequences from the gang.

The prosecutor responded to the defense argument by pointing out that there was no evidence Lainez was a member of the Mara Salvatrucha gang, and that it therefore did not make sense that defendant would be punished by the gang if he blamed Lainez for the shooting.

The jury found defendant guilty of all counts, finding the murders to be of the first degree, and found true all of the special circumstances and other allegations. At the sentencing hearing, the trial court imposed consecutive LWOP terms for the murders, a consecutive term of seven years to life for the attempted murder, and consecutive terms of 25 years to life for the firearm discharge allegations associated with the murders and attempted murder. The trial court imposed the upper term of three years for the criminal street gang count (§ 186.22, subd. (a)) but stayed the punishment for that count pursuant to section 654. The trial court struck or stayed the punishment for the remaining enhancements.

III. DISCUSSION

A. Trial Court's Ruling on Rodas Testimony

Defendant contends the trial court should not have permitted Rodas to testify, since the court knew that Rodas would invoke his Fifth Amendment privilege against self-incrimination as to certain questions. Defendant contends the trial court's ruling violated his Sixth Amendment and Fourteenth Amendment rights to due process, a fair trial, and confrontation.

1. Proceedings Below

a. Defendant's Motion in Limine

Defendant filed a motion in limine, in which he requested the trial court (1) preclude the parties from mentioning Rodas's potential testimony to the jury; (2) appoint counsel for Rodas; and (3) hold a hearing to determine whether Rodas intended to invoke his Fifth Amendment privilege against self-incrimination.

The trial court ordered the parties not to mention Rodas in opening statements, and it appointed counsel for Rodas. Counsel for Rodas subsequently filed a memo to the court, in which he noted that Rodas could be charged with obstruction of justice if he admitted lying about defendant's confession. Additionally, because Rodas had been arrested for providing false identification to a police officer, and he had been in the presence of a federal law enforcement official, his testimony could lead to federal charges. Counsel for Rodas indicated that Rodas would testify only if he was granted use immunity for the federal crime or if he was allowed to assert the Fifth Amendment privilege against self-incrimination as to any impeachment questions concerning his false statements to law enforcement.

b. Evidence Code Section 402 Hearing

An Evidence Code section 402 hearing regarding Rodas's potential testimony was held on April 24, 2013. The prosecutor represented that Rodas would be provided with

use immunity for his testimony pursuant to section 1324[5] as well as immunity for the statements he made to the officers.

Rodas testified at the Evidence Code section 402 hearing. While in a cell with defendant on October 19, 2010, Rodas had asked defendant "why was he taking responsibility for something that he didn't do," and defendant had answered, "I did it." Rodas testified that he told the truth when he reported this conversation to Officer Garcia. At the time, Rodas believed he would get a benefit from providing the information, since Officer Garcia had promised to "get less time for [Rodas]." Rodas did not, however, get less time.

On cross-examination at the Evidence Code section 402 hearing, Rodas acknowledged that he had learned about the shooting the day after it occurred, and he acknowledged knowing that Lainez had been charged with the same homicide that

[5] Section 1324 provides: "In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated thereby, and if the district attorney of the county or any other prosecuting agency in writing requests the court, in and for that county, to order that person to answer the question or produce the evidence, a judge shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he or she would have been privileged to withhold the answer given or the evidence produced by him or her, no testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case. But he or she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. Nothing in this section shall prohibit the district attorney or any other prosecuting agency from requesting an order granting use immunity or transactional immunity to a witness compelled to give testimony or produce evidence."

defendant was being tried for. Rodas admitted that he and Lainez had been friends since childhood. Rodas admitted that after his federal sentence was served, he was going to be deported back to his hometown in El Salvador. Rodas reiterated that when he was interviewed by the police, he had been promised "less time" on his federal case if he provided them with information. He had also been promised help with staying in the United States legally. Rodas admitted that not everything he told the police was true. Rodas admitted he had provided a false name to the officers because he knew he could be federally prosecuted for having returned to the United States illegally after a prior deportation. In exchange for his testimony in this case, Rodas had been promised that he would not be prosecuted for any false statements he gave to the police. He had also requested and been permitted to see his sister.

After Rodas testified at the Evidence Code section 402 hearing, defendant's trial counsel asked the trial court whether the prosecutor could "go into" gang issues during Rodas's testimony, and whether Rodas could be impeached with his four prior felony convictions. The prosecutor indicated that she wanted to ask Rodas about whether he was a gang member, about teardrop tattoos, and about being a "snitch." Counsel for Rodas indicated that Rodas would assert the Fifth Amendment in response to all of those questions. Defendant's trial counsel argued that if Rodas invoked the Fifth Amendment as to gang issues, it would "undermine[]" the defense because she could not elicit facts about his possible motivation for placing blame on defendant. Defendant's trial counsel took the position that Rodas should not be permitted to "take the stand" if she was not able to cross-examine him about gang issues.

Following the Evidence Code section 402 hearing, counsel for Rodas filed a second memo to the court. He stated that Rodas would "assert a Fifth Amendment privilege as to any question related to his membership in, or knowledge of, Mara Salvatrucha." He argued that even if Rodas was granted immunity in California, which would bar federal prosecution, Rodas could still be prosecuted in another state. In

response, defendant's trial counsel filed a declaration in which she asserted that because Rodas was not going to answer questions about his gang membership on cross-examination, the trial court should not allow Rodas to testify about defendant's confession.

The trial court ruled that Rodas would be allowed to testify, despite the fact that he was expected to invoke the Fifth Amendment as to questions about gang activities. The trial court found that the decision whether to invoke the Fifth Amendment was to be made by Rodas and his counsel, not the trial court, noting that even if Rodas was given additional immunity for testimony about gangs, it "potentially" would not protect Rodas from prosecution in another state. The trial court ruled that Rodas could be impeached with his prior convictions for inflicting corporal injury on a spouse and with the fact that he had previously been deported.

c. Rodas's Cross-Examination at Trial

On cross-examination, when defendant's trial counsel asked Rodas if he was a member of the Mara Salvatrucha gang, Rodas invoked the Fifth Amendment. Rodas also invoked the Fifth Amendment when defendant's trial counsel asked Rodas about getting jumped into the gang. When counsel for Rodas objected to further questioning about Rodas's gang membership, the trial court ruled that the defense would be permitted to continue asking such questions and that Rodas would have to invoke the Fifth Amendment as to each question, in front of the jury.

Defendant moved for a mistrial, asking the trial court to strike Rodas's testimony or provide him with immunity for testimony about his gang membership so that his testimony could not be used in a future prosecution.

Counsel for Rodas filed two more memos to the court. In the first memo, he again requested immunity for Rodas's testimony about his gang membership. In the second memo, he asserted that if Rodas was required to assert the Fifth Amendment privilege as

to repeated questions about his gang membership, the mode of questioning would amount to "attorney testifying."

The trial court denied defendant's motion for a mistrial and declined to strike Rodas's testimony. The trial court also denied Rodas's request for a ruling precluding defendant's trial counsel from asking multiple questions as to which Rodas was likely to invoke the Fifth Amendment.

On further cross-examination, Rodas admitted he was "a convicted felon," that he had a 2004 conviction of a "felony involving moral turpitude," that he had a separate 2004 conviction of a "crime involving moral turpitude," that he had previously been deported from the United States, and that he was currently serving a sentence in federal prison "for entering the country illegally after being deported for a felony involving moral turpitude." Rodas also admitted that he had been arrested in Santa Cruz on October 19, 2010 by a local police officer and a federal agent. He admitted he was fearful of being deported again, and that he wanted to remain in the United States, where members of his family lived, including his young son. He admitted he knew he could go to federal prison, and that he had given the agents a false name. He admitted that after he was arrested, he was hoping to "find a way to stay out of jail" and prevent his deportation.

Rodas invoked the Fifth Amendment when defendant's trial counsel asked whether, after his arrest, the police had asked him questions about the Mara Salvatrucha's hierarchy and members. Rodas also invoked the Fifth Amendment when he was asked whether he had provided any other assistance to law enforcement.

Rodas acknowledged that during his interrogation, the federal agent had told him that he was "looking at serving 80 months in federal prison" for returning to the United States illegally. The officers told Rodas that if he provided information about certain crimes, they could help him become a United States citizen, get his federal sentence reduced to two years, and make sure he wasn't deported. Rodas admitted that he wanted

the officers to be "happy with the answers" he provided. Some of what he said was true, but he lied about other things. Rodas invoked the Fifth Amendment when defendant's trial counsel asked, "Did you know that it was illegal to tell them things that weren't true?" Rodas denied that he had lied to the officers for any other reason than wanting them to help him.

Defendant's trial counsel asked Rodas about the immunity agreement he entered into with the prosecution. Rodas acknowledged that under the agreement, he could not be prosecuted for anything he said during his interviews on October 19 and 20, 2010, nor for anything the officers "observed" during their contact with him on those dates. Rodas believed the agreement applied to both state and federal charges. Rodas acknowledged that the prosecutor's investigator had allowed Rodas to visit with his sister in Santa Cruz after he was transported for trial.

Rodas invoked the Fifth Amendment when defendant's trial counsel asked him if he had "M" and "S" tattoos showing his affiliation with the Mara Salvatrucha gang. He also invoked the Fifth Amendment in response to questions about whether he had "Mara Salvatrucha" on his chest and whether he had "the demon's pitchfork on [his] torso."

Rodas acknowledged that he was from El Salvador, specifically a town near the border of El Salvador and Honduras. He invoked the Fifth Amendment to questions about whether the town had "a gang problem" and whether he had seen or experienced "gang violence" there.

Rodas admitted that when he talked to the police on October 19 and 20, 2010, he had "snitched." Rodas had seen his friends "confront a snitch," but he invoked the Fifth Amendment when he was asked about what had happened. He did, however, admit that snitching is dangerous and that if he was to "tell on someone else to law enforcement," he or his family could get hurt. Rodas also admitted he did not want to tell the officers "the truth about certain people" because he was scared of them.

Rodas acknowledged that during the October 19, 2010 interview, he talked about another homicide, not the one defendant was involved in. He admitted he had lied to the officers, telling them that a particular person was responsible when, in fact, he knew that the person had not committed the homicide. He was not scared of the person he had named.

Rodas was interviewed for 11 hours on that first day, and he gave the officers "a lot of information," so he was surprised to be taken to jail afterwards. He was put into a unit with people who appeared to be gang members. He was housed with someone named Tierra, who he knew. Rodas invoked the Fifth Amendment when asked if Tierra was a "pretty senior member" of the Mara Salvatrucha gang. Rodas agreed that Tierra was "kind of a scary guy," but he claimed not to be scared of him. He "got along fine" with Tierra during the time they were housed together, which was about a week. Rodas invoked the Fifth Amendment when he was asked whether he had talked to Tierra "about how the gang wanted [defendant] to handle his case."

Rodas admitted that he knew Lainez, but he denied that Tierra had talked to him about Lainez. Rodas acknowledged that he and Lainez were originally from the same town in El Salvador and that they had played together as children. Lainez's mother owned a grocery store in the town, and Rodas had been going to that store for as long as he could remember. Rodas planned to return to his hometown after serving his federal prison term and being deported. Rodas understood that Lainez was living in that town, and he expected to see Lainez there. Rodas invoked the Fifth Amendment when he was asked whether Lainez was a member of the Mara Salvatrucha gang. He admitted having referred to Lainez as a "bad ass," which meant that Lainez "could do anything," even commit murder. Rodas acknowledged that he did not know much about defendant: he did not know where in El Salvador defendant was from or anything about defendant's family.

When Rodas was interviewed by the police on the second day, he was thinking about his possible federal sentence and possible deportation. He "really hoped" that what he told the officers would result in the benefits the officers had previously mentioned. The officers brought up defendant's case during the second interview. At that point, Rodas said defendant had confessed to him. The officers seemed interested and happy to get that information, which made Rodas hopeful about his chances of not being deported and not going to federal prison.

Rodas admitted that he talked with defense investigator Alcantara on March 1, 2013, and that he told Alcantara he had lied to the officers about defendant's confession. Rodas admitted saying that he had lied in order to avoid deportation. However, he was now testifying that he lied to Alcantara.

Rodas admitted he had talked to people about the Canfield Avenue shooting around the time it had happened, but he invoked the Fifth Amendment when defendant's trial counsel asked whether some of those people were gang members. Rodas admitted having heard that Lainez was "the real killer." He admitted having told the defense that "[Lainez] did it because he was the bad ass." He admitted having heard that defendant had been given the gun after the shooting and told to "get rid of it and go to Mendota." Rodas invoked the Fifth Amendment when defendant's trial counsel asked whether he had heard this from gang members.

2. Contentions

Defendant contends the trial court should not have permitted Rodas to testify, since the trial court knew that Rodas would invoke his Fifth Amendment privilege against self-incrimination as to questions about the Mara Salvatrucha gang. Defendant argues that by invoking the Fifth Amendment, Rodas "thwarted" the defense cross-examination, which would have shown that Rodas was a senior member of the Mara Salvatrucha gang and a longtime friend of Lainez, who was an "important asset" to the Mara Salvatrucha gang. Defendant explains that the testimony he sought to elicit would

have suggested a motive for Rodas to fabricate his testimony about defendant's confession.[6]

The Attorney General contends that the trial court erred by allowing Rodas to invoke the Fifth Amendment as to his gang membership and gang activities. The Attorney General contends that the immunity agreement "fully protected" Rodas from prosecution based on that line of questioning. However, the Attorney General argues, "the error was harmless" for a number of reasons. First, other evidence showed Rodas's membership in the Mara Salvatrucha. Second, Rodas's invocation of the Fifth Amendment in front of the jury "only serve[d] to damage his credibility." Third, Rodas was impeached with his prior convictions and admitted lies to the police. Fourth, the jury knew that Rodas was motivated by potential leniency. Fifth, the jury knew that Rodas and Lainez were long-time friends. Sixth, the defense used Rodas's testimony to bolster the theory that Lainez was the shooter and that defendant was taking the blame for him pursuant to directives from the gang. Seventh, there was overwhelming evidence of defendant's guilt, including testimony about defendant's actions in Apartment No. 6 on the night of the shooting, Melchor's identification of defendant as the shooter, defendant's flight and possession of the gun used in the shooting, and defendant's teardrop tattoos.

3. Analysis

The Sixth Amendment provides that a criminal defendant has the right to confront and cross-examine witnesses against him or her. (U.S. Const., 6th & 14th Amends.; *Pointer v. Texas* (1965) 380 U.S. 400, 403-405.) " '[A]criminal defendant states a violation of the Confrontation Clause by showing that he [or she] was prohibited from

[6] Defendant discusses cases in which the " 'drastic' remedy" of "*striking* a witness's entire testimony" was found to be the proper remedy for a witness's refusal to answer questions on cross-examination (see *People v. Sanders* (2010) 189 Cal.App.4th 543, 555), but he does not contend the trial court should have done so here.

engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 (*Van Arsdall*), quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318.)" (*People v. Frye* (1998) 18 Cal.4th 894, 946 (*Frye*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' (*Van Arsdall, supra,* 475 U.S. at p. 680), the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]" (*Frye, supra,* 18 Cal.4th at p. 946; see also *People v. Homick* (2012) 55 Cal.4th 816, 861 (*Homick*) [the Sixth Amendment " 'guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer' "].) Therefore, even where the scope of cross-examination is " 'narrowed' " because the trial court permits a witness to refuse to answer questions, the defendant's confrontation rights are not violated as long as the jury has had an opportunity to assess the witness's demeanor and credibility. (*Homick, supra,* at p. 861.)

Similarly, a defendant's due process right to present a defense is not violated where the trial court's ruling only precludes " 'some evidence concerning the defense' " and does not completely exclude evidence supporting the defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103 (*Fudge*); see also *People v. Abilez* (2007) 41 Cal.4th 472, 503 [defendant was precluded from presenting some, but not all, evidence of co-

defendant's prior crimes; the excluded evidence was not " 'so vital to the defense that due process principles required its admission' "].)

Here, although defendant was precluded from eliciting testimony from Rodas about his membership in the Mara Salvatrucha gang, the restrictions on his cross-examination of Rodas did not infringe on his constitutional rights of confrontation, cross-examination, or presentation of a defense.

Most importantly, Rodas " 'was subjected to lengthy cross-examination' " by defendant's trial counsel. (*Homick, supra,* 55 Cal.4th at p. 861.) Through cross-examination, the defense was able to impeach Rodas with his prior convictions, his prior deportation, and his illegal reentry into the United States. The defense also elicited many significant facts relevant to Rodas's credibility, including the fact he had provided a false name to the police, the fact he was hoping for a benefit in exchange for giving information to the police, the fact he had told some lies to the police, the fact that it would normally be dangerous to be a snitch, the fact that he was childhood friends with Lainez, the fact that he considered Lainez a "bad ass" who could commit murder, the fact that he expected to see Lainez in their hometown after his deportation, and the fact he had heard that Lainez was "the real killer." Thus, despite the trial court's ruling permitting Rodas to invoke the Fifth Amendment as to gang-related questions, the defense was permitted to conduct "a very detailed cross-examination," which effectively brought out numerous reasons for the jury to doubt Rodas's credibility. (*People v. Lucas* (2014) 60 Cal.4th 153, 272, disapproved of on other grounds by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) While Rodas's refusal to answer questions about the Mara Salvatrucha gang " 'narrowed the practical scope of cross-examination, [his] presence at trial as a testifying witness gave the jury the opportunity to assess [his] demeanor and whether any credibility should be given to [his] testimony or [his] prior statements.' " (*Homick, supra,* at p. 861.) Given the breadth of this cross-examination, the trial court's limitations did not bolster Rodas's credibility in any way.

Further, Rodas's testimony did not prevent defendant's trial counsel from arguing to the jury that Lainez was the shooter and that the Mara Salvatrucha gang had ordered defendant to "take the fall" for the shootings. In fact, because Detective Garcia provided evidence of Rodas's membership in the Mara Salvatrucha gang (for instance, evidence of Rodas's multiple gang-related tattoos), Rodas's testimony provided support for the defense argument that the Mara Salvatrucha gang wanted defendant to be blamed, particularly since Rodas had been able to snitch without any gang repercussions. Thus, despite the trial court's ruling restricting cross-examination of Rodas, defendant was able to present the defense that he now claims to have been deprived of.

In sum, "[b]ecause defendant cannot show that the introduction of the excluded line of cross-examination would have produced a significantly different impression of [Rodas's] credibility [citation], we conclude the trial court's ruling did not violate defendant's rights under the Sixth Amendment." (See *Frye*, *supra*, 18 Cal.4th at p. 947.) For the same reasons, the trial court's ruling also did not violate defendant's rights under the Fourteenth Amendment. (See *Fudge*, *supra*, 7 Cal.4th at p. 1103.)

B. Admission of Expert Testimony About Defendant's Teardrop Tattoos

Defendant contends the trial court erred by allowing Sergeant Chappell to testify about the meaning of defendant's filled-in teardrop tattoos. He argues that the testimony was more prejudicial than probative and thus should have been excluded pursuant to Evidence Code section 352.

1. Proceedings Below

Defendant filed a motion in limine concerning gang expert testimony, in which he specifically sought to exclude testimony "regarding the significance of [defendant's] teardrop tattoos." Defendant noted that at the preliminary hearing, Detective Hernandez had testified that a filled-in teardrop tattoo " 'historically' " means " 'that you've killed someone,' " and that two such tattoos means " 'that there were two people who were killed.' " Defendant also noted that he anticipated the prosecution would introduce

similar testimony from Sergeant Chappell. Defendant objected on a number of grounds, including Evidence Code section 352. He asserted that the testimony would tell the jury that defendant had made "a de facto confession to the charged crimes," which would be "prejudicial, confusing, and misleading."

The trial court held an Evidence Code section 402 hearing before ruling on defendant's motion. Sergeant Chappell discussed the basis for his knowledge about the meaning of teardrop tattoos, and the trial court ruled that he was qualified as an expert "in the field of gangs and in particular for this case in the area of tattoos."

Sergeant Chappell subsequently testified that in the gang culture, a filled in teardrop tattoo "traditionally means that you killed somebody," and he agreed with the prosecutor that a teardrop tattoo is "a big fat brag that you killed somebody." Sergeant Chappell also testified that there would be "severe discipline" from the gang if a gang member obtained a tattoo that indicated he was "bragging" about having committed a murder but he had not done so.

On cross-examination, Sergeant Chappell acknowledged that a number of celebrities had teardrop tattoos. He rejected the characterization of teardrop tattoos as "confessions to murder," explaining that a teardrop tattoo is more of a "badge of honor." When defendant's trial counsel asked whether the value of such a tattoo would be "diminished" if the person obtained the tattoo just before "a jury trial for a double homicide," Sergeant Chappell replied, "[T]hat would be the ultimate act of bravado and machismo knowing that you're about to walk into court accused of a double murder and you have two new filled in teardrop tattoos on your face that the jury is going to see, that the Judge is going to see, that you're going to have to explain to your defense lawyer why it is that you put this on your face at this time. I would say that's the ultimate form of taking credit and saying this is me and I don't care."

2. Analysis

Under Evidence Code section 352, a "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The prejudice referred to in Evidence Code section 352 is not the prejudice to a defendant that naturally flows from probative evidence tending to demonstrate guilt of a charged offense, but rather the prejudice resulting from " 'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638 (*Karis*).)

A trial court's discretionary ruling under Evidence Code section 352 " ' "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" ' [Citation.]" (*People v. Williams* (2008) 43 Cal.4th 584, 634-635 (*Williams*).)

In *People v. Ochoa* (2001) 26 Cal.4th 398 (*Ochoa*), abrogated in part on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14, a gang expert testified that the defendant had "on his forehead a tattoo of the number '187,' the California Penal Code section proscribing murder, which had been added after the charged homicides occurred." (*Ochoa, supra,* at p. 437.) The *Ochoa* defendant had objected, based on Evidence Code section 352, to the admission of evidence about the tattoo. The defendant had also argued that the gang expert "was not qualified to offer an expert opinion about the tattoo's significance." (*Ochoa, supra,* at p. 437.)

The California Supreme Court upheld the trial court's admission of the evidence and the expert testimony. First, "[t]he trial court properly found the tattoo represented an admission of [the] defendant's conduct and a manifestation of his consciousness of guilt"

and "reasonably considered the tattoo highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder." (*Ochoa, supra,* 26 Cal.4th at p. 438.) Second, the trial court properly allowed the expert testimony regarding the defendant's tattoos, since he was a qualified expert on gangs and because "the culture and habits of criminal street gangs are not matters within common knowledge." (*Ibid.*) The *Ochoa* court noted that the expert was properly allowed to testify "as to the significance of the '187' tattoo" even without evidence as to the defendant's actual subjective intent. (*Id.* at p. 439.)

Defendant contends that *Ochoa* is distinguishable because in that case, the expert did not give a direct opinion "as to the mental state of a gang member bearing a '187' tattoo" but left the actual meaning of the tattoo up to the jury. However, the *Ochoa* court did uphold the admission of expert testimony that the "187" tattoo referred to the Penal Code section for murder, and the court indicated it was permissible for the jury to interpret that evidence as the defendant's admission of guilt. (*Ochoa, supra,* 26 Cal.4th at p. 438.) Although the *Ochoa* court considered an Evidence Code section 352 argument as to only the tattoo itself, not the expert testimony, the court did find that the expert testimony about the meaning of the "187" tattoo was properly admitted even though the jury could have used that evidence tofind that the defendant was admitting he had committed a murder. (*Ochoa, supra,* at pp. 438-439.) Moreover, the California Supreme Court has previously upheld the admission of a gang expert's testimony about the likely mental state of a hypothetical gang member. (E.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. Gonzalez* (2006) 38 Cal.4th 932, 945.)

In this case, the trial court's ruling admitting the expert testimony about filled-in teardrop tattoos was not " ' "arbitrary, capricious or patently absurd." ' " (*Williams, supra,* 43 Cal.4th at p. 634.) The trial court reasonably determined that expert testimony about the meaning of filled-in teardrop tattoos was not the type of evidence likely to " 'evoke an emotional bias against' " defendant as an individual (*Karis, supra,* 46 Cal.3d

at p. 638) but rather evidence that was very probative of defendant's guilt of the charged offenses. Although the jury could have used the expert testimony to find that, by obtaining the teardrop tattoos, defendant had admitted to committing two murders, the jury was still entitled to reject the expert opinion about the meaning of the teardrop tattoos. For instance, the jury could have concluded that—as defendant's trial counsel argued—because defendant's teardrop tattoos were on the right side of his face, they did not mean he had actually committed two murders.

We conclude the trial court did not abuse its discretion by admitting Sergeant Chappell's expert testimony about teardrop tattoos.

C. Cumulative Effect of Asserted Evidentiary Errors

Defendant contends that even if the trial court's asserted errors concerning Rodas and the teardrop tattoos did not individually result in prejudice, their combined effect was so prejudicial as to require reversal. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) However, we have found that the trial court's rulings concerning Rodas's testimony did not violate defendant's rights under the Sixth or Fourteenth Amendments, and we have found that the trial court did not abuse its discretion by admitting Sergeant Chappell's expert opinion testimony about defendant's teardrop tattoos. Therefore, there is no error to aggregate.

D. Sufficiency of the Evidence: Active Participation in a Criminal Street Gang

Defendant contends his conviction of active participation in a criminal street gang must be reversed because there is no substantial evidence supporting a finding that he promoted, furthered, or assisted "in any felonious criminal conduct by members of [his] gang." (§ 186.22, subd. (a).) He contends there was no evidence that his coparticipant, Lainez, was a member of the Mara Salvatrucha gang at the time of the offenses, as required under section 186.22, subdivision (a).

In addressing the question of whether there was sufficient evidence to support defendant's conviction, " 'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507.)

Section 186.22, subdivision (a) provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

"The elements of the gang participation offense in section 186.22(a) are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.]" (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).)

In *Rodriguez,* the California Supreme Court held that a gang member does not violate section 186.22, subdivision (a) if he or she "commits a felony, but acts alone[.]" (*Rodriguez, supra,* 55 Cal.4th at p. 1128.) In order to violate section 186.22, subdivision (a), the requisite " 'felonious criminal conduct' " must "be committed by at least two gang members." (*Rodriguez, supra,* at p. 1132.)

The *Rodriguez* defendant was a Norteño gang member who committed an attempted robbery. "There was no evidence that [the] defendant acted with anyone else." (*Rodriguez, supra,* 55 Cal.4th at p. 1129.) The *Rodriguez* defendant contended that he could not be convicted of violating section 186.22, subdivision (a) because he did not

" 'promote[ ], further[ ], or assist[ ]' " any felonious criminal conduct by members of the gang. (*Rodriguez, supra,* at p. 1131.) The California Supreme Court agreed. (*Id*. at p. 1139.)

The Supreme Court found it "significant that the offense requires a defendant to promote, further, or assist *members* of the gang." (*Rodriguez, supra,* 55 Cal.4th at p. 1131.) Based on the plain meaning of the plural noun "members," the court held that the statute "requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he [or she] is a gang member. [Citation.]" (*Id.* at p. 1132.) The court found that "[i]f the Legislature had intended to criminalize any felonious criminal conduct committed by any active and knowing participant, including one acting alone, the phrase 'by members of that gang' would be superfluous." (*Id.* at p. 1133.) *Rodriguez* thus establishes that in order to violate section 186.22, subdivision (a), the requisite "felonious criminal conduct" must "be committed by at least two gang members." (*Rodriguez, supra,* at p. 1132; see *People v. Ramirez* (2016) 244 Cal.App.4th 800, 818 [insufficient evidence to support gang participation charges where gang expert opined that one codefendant was "an associate, not a member" of the gang].)

Defendant points out that Officer Hernandez testified that, in his opinion, Lainez was an "active participant" in the Mara Salvatrucha gang, but not a member of that gang. Additionally, the prosecutor conceded, during argument to the jury, that Lainez was not "even a member" of the Mara Salvatrucha gang, "just an active participant." (See *People v. Burnett* (1999) 71 Cal.App.4th 151, 172-173 [on appeal, prosecution was bound by position taken during closing argument].)

The Attorney General contends that evidence of Lainez's active participation in the gang was sufficient to bring defendant within the ambit of section 186.22, subdivision (a). However, although the statute requires evidence of *the defendant's* "active participation in a criminal street gang, in the sense of participation that is more

than nominal or passive," that is just one of the three elements of the crime. (*Rodriguez, supra,* 55 Cal.4th at p. 1130.) The statute also requires evidence of the defendant's "knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity" and evidence of the defendant's "willful promotion, furtherance, or assistance in any felonious criminal conduct by *members* of that gang." (*Ibid.*, italics added.) Thus, while the defendant need not be an actual gang member at the time he or she commits the offense, the statute does requires that there be at least two gang *members* involved in the felonious criminal conduct. *Rodriguez* establishes that a defendant's conviction under section 186.22, subdivision (a) cannot stand where the defendant is the only gang member involved in the underlying felonious criminal conduct.

Here, Officer Hernandez, one of the gang experts who was familiar with Lainez, testified that Lainez was *not* a gang member. He testified that Lainez sold drugs in gang territory and paid rent to the gang in exchange for gang protection, and that Lainez had previously been seen associating with Mara Salvatrucha gang members. Although the jury was not bound by Officer Hernandez's expert opinion that Lainez was not an actual member of the Mara Salvatrucha gang (see *People v. Vang* (2011) 52 Cal.4th 1038, 1050), no other evidence introduced at trial provided a basis for the jury to find, beyond a reasonable doubt, that Lainez was an actual member of the Mara Salvatrucha gang. We will therefore reverse the judgment and order the trial court to strike defendant's conviction of active participation in a criminal street gang.

E. Cruel and Unusual Punishment

Defendant contends that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment, because he received mandatory LWOP terms for special circumstance murders, rather than a sentence that was based on individualized consideration of his personal characteristics and the offenses of which he was convicted.

Defendant was 18 years old at the time he committed the murders in this case. During defendant's sentencing hearing, his trial counsel stated that she wanted to argue

"that the sentencing scheme requiring mandatory life without parole terms" violated the Eighth Amendment as applied to defendant, but she also acknowledged that the law did not support that claim. On appeal, defendant likewise acknowledges that "current case law" does not support his argument, but he nevertheless presents this claim because of evolving case law.

In *Graham v. Florida* (2010) 560 U.S. 48, 74 (*Graham*), the United States Supreme Court held that the Eighth Amendment prohibits imposition of a life without the possibility of parole sentence for juvenile nonhomicide offenders. *Graham* recognized that such a sentence is especially harsh for a juvenile offender who will spend more years and a greater percentage of his or her life in prison than a similarly sentenced adult. (*Id*. at p. 70.) *Graham* concluded that a nonhomicide juvenile offender is entitled to a sentence that provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id*. at p. 75.) "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Id*. at p. 82.)

Two years later, the United States Supreme Court ruled that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (*Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 2460] (*Miller*).) In *Miller*, the Court explained that its prior cases, including *Graham*, had "establish[ed] that children are constitutionally different from adults for purposes of sentencing." (*Id.* at p. __ [132 S.Ct. at p. 2464].) Specifically, "juveniles have diminished culpability and greater prospects for reform," making them " 'less deserving of the most severe punishments.' " (*Ibid.*)

The *Miller* court summarized its holding as follows: "Mandatory life without parole for a juvenile precludes consideration of his [or her] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks

and consequences. It prevents taking into account the family and home environment that surrounds him [or her]—and from which he [or she] cannot usually extricate himself [or herself]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his [or her] participation in the conduct and the way familial and peer pressures may have affected him [or her]. Indeed, it ignores that he [or she] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his [or her] inability to deal with police officers or prosecutors (including on a plea agreement) or his [or her] incapacity to assist his [or her] own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2468].)

The *Miller* court indicated it believed that LWOP sentences for juveniles would be "uncommon" and limited to " 'the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.]" (*Miller, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2469].) The court specified that before such a sentence is imposed on a juvenile in a homicide case, the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*, fn. omitted.)

Defendant argues that the rationale of *Graham* and *Miller* does not support the "arbitrary chronological divide" between offenders who are under 18 and those who are over 18 at the time of their crimes. He points out that, according to the *Miller* court, " 'youth is more than a chronological fact.' [Citation.]" (*Miller, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2467].) Defendant further points out that if he had been just a few months younger at the time of the offense (i.e., under 18 years old), he would be entitled to seek resentencing after 15 years of imprisonment pursuant to section 1170, subdivision (d)(2)(A)(i).

The appellate court in *People v. Argeta* (2012) 210 Cal.App.4th 1478 (*Argeta*) addressed a similar argument. In *Argeta*, the defendant committed his crimes—a murder and five attempted murders—five months after his 18th birthday. (*Id.* at p. 1482.) He contended that "the rationale applicable to the sentencing of juveniles should apply to him," but the court disagreed, noting that the United States Supreme Court had rejected similar arguments in *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*) and *Graham.* (*Argeta, supra,* at p. 1482.)

In *Roper*, the court observed: "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." (*Roper, supra,* 543 U.S. at p. 574.) However, the court continued, "a line must be drawn," and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." (*Ibid.*) The *Argeta* court further observed: "Making an exception for a defendant who committed a crime just five months past his [or her] 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point." (*Argeta, supra,* 210 Cal.App.4th at p. 1482.)

Because the age of 18 is "the line the high court has drawn in its Eighth Amendment jurisprudence" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380) and because we are required to follow United States Supreme Court decisions on the Eighth Amendment (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we reject defendant's contention that the mandatory imposition of LWOP terms for defendant's special circumstance murders constituted cruel and unusual punishment.

IV. DISPOSITION

The judgment is modified to strike defendant's conviction for active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)). The clerk of the superior court is directed to prepare an amended abstract of judgment and to send a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MIHARA, J.